No. 80-1342

APR 7 1981
ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1980

EDNA K. BASSETT AND PAUL EDWARD ESSLING, ETC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States, in exercising its power of eminent domain, must take and pay for private property in accordance with a district court's award of just compensation before it may challenge the correctness of that award on appeal.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-22) is reported at 633 F. 2d 108.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1980. A petition for rehearing was denied on December 4, 1980 (Pet. App. A-24). The petition for a writ of certiorari was filed on February 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In June 1977, the United States, on behalf of the National Park Service, filed a complaint in condemnation in the United States District Court for the District of Minnesota, seeking to acquire three tracts of land for the Voyageurs National Park in northern Minnesota. Two of the tracts,

both owned by Edna Bassett, are located on Lake Kabetogama. One is a 60-acre parcel on the mainland, and the other is a 1.5-acre island. The third tract, owned by the estate of Edward Essling, is a 23.75-acre parcel located on a narrow inlet.[1] A jury determined that just compensation for the Bassett land was $232,480 and that just compensation for the Essling tract was $56,100 (Pet. App. A-27).

The government appealed, and the court of appeals reversed (Pet. App. A-1 to A-22), holding that the district court should not have allowed the jury to consider speculative evidence that the three remote tracts had highest and best uses as residential subdivision and condominium sites. The court of appeals rejected petitioners' argument that the district court's condemnation awards are not appealable until the government actually takes title to the property in question and pays the amount of the judgments either to the affected landowners or into the registry of the district court. Relying on *Danforth* v. *United States*, 308 U.S. 271 (1939), the court of appeals held that, because condemnation proceedings are intended to permit the sovereign to ascertain how much certain property will cost before deciding whether to buy it, the government should not be required to "take" property as a condition of appealing a condemnation award (Pet. App. A-20 to A-21).

ARGUMENT

The decision of the court of appeals is correct and follows well-established law. There is no conflict among the circuits, and, indeed, no federal court has ever suggested that the government must take title to property before it may appeal a district court's condemnation award. Petitioners' position is inconsistent with the fundamental purpose of

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[1]The caption of this case in the court of appeals refers to 341.45 acres of land, because the government's complaint sought to condemn other land in addition to the three tracts involved in the present petition.

condemnation proceedings, which is to enable the government to determine the price of property before deciding whether to buy it. Further review is therefore not warranted.

As petitioners themselves recognize (Pet. 6-7), the government either may make an irrevocable commitment to take land by proceeding under the Declaration of Taking Act, 40 U.S.C. 258a-258e, or it may proceed by a condemnation complaint, as it did in this case. When the latter procedural device has been used, federal appellate courts, including this Court, have routinely reviewed the resulting condemnation awards without requiring the government to take title to the property or to make a final decision on whether it wishes to take the property upon the completion of judicial review. See, *e.g.*, *Hanson Co.* v. *United States*, 261 U.S. 581, 582-583 (1923).[2] As this Court has recognized, the complaint method of condemnation allows the government to make an informed decision, after the judicial system has definitively set the condemnation award, regarding the feasibility and desirability of acquiring a particular piece of property. *Danforth* v. *United States*, 308 U.S. 271, 284 (1939). See also *Barnidge* v. *United States*, 101 F. 2d 295, 298 (8th Cir. 1939). This legitimate purpose would obviously be thwarted if the government were required to pay the

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[2]Petitioners' reliance (Pet. 9-10) on *Catlin* v. *United States*, 324 U.S. 229 (1945), is misplaced. *Catlin* held that a landowner may not appeal the validity of a taking until proper compensation has been determined and a final judgment entered. The Court sought to avoid piecemeal appeals on the separate questions of the validity of a taking and the sufficiency of the compensation awarded. *Id.* at 233-234. Here, by contrast, the only issue in the district court was compensation, that issue was determined by the jury, and final judgments were entered. In addition, *Catlin* was a proceeding under the Declaration of Taking Act; the Court interpreted that statute as not allowing a separate appeal on the propriety of the taking. *Id.* at 238. No declaration of taking was filed in the present case.

condemnation award and thus take the property in order to challenge the district court's ruling on appeal.

The judgments in this case were "final" within the meaning of 28 U.S.C. 1291. The judgments ended the litigation on the merits and left nothing for the district court to do.[3] Since the entire purpose of the district court proceedings—the ascertainment of compensation—had been achieved, and judgments awarding compensation had been entered, no bar to appeal remained. Although the government ultimately may decide not to acquire the tracts of land involved, this has no bearing on the finality of the judgments setting the amount that the government must pay if it wishes to proceed with the acquisition.

Petitioners assert (Pet. 11-12) that some unfairness may result if the government is permitted to appeal in these circumstances. But the interests of the landowners are protected. If the United States does not go forward with the condemnation, it will be liable for reasonable costs incurred by the landowners in the condemnation proceedings, including reasonable attorney, appraisal, and engineering fees. See Section 304(a)(2) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4654(a)(2). See also *United States* v. *Bodcaw Co.*, 440 U.S. 202, 203 n.3, 204 (1979). Accordingly, appeals of condemnation awards before the government decides whether to take property serve the government's legitimate interests without imposing any unreasonable burden on landowners.

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[3]If the United States had chosen to take title to these tracts after the condemnation judgments were filed, any further order of the district court, such as one confirming title in the United States, would have been purely ministerial. A decision "final" under 28 U.S.C. 1291 does not necessarily mean the last order that can possibly be made in a case. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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